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Criminal Law--Shoplifting--Lack of Requirement of Intent Does Not Invalidate Statute

David Mayer Katz

West Virginia University College of Law

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this principle when applied to a proceeding relating to the custody of children. He declared that the contract entered into by the parents in Virginia should not preclude the South Carolina courts from determining the question of custody. He maintained that the contractual rights of the parents should be subordinated to the welfare of the children.

There is much that can be said for Justice Oxner's dissent, not only on the proposition that an agreed order of dismissal should not bar a subsequent suit on the same cause of action by the same parties but that any custody decree by a foreign court should be subject to inquiry by a court of competent jurisdiction. The primary principle in this field should be the discretion of the court as exclusively governed by the child's welfare.

On the other hand, there are arguments that support the proposition that custody decrees should be subject to the full faith and credit clause. If parental "child snatching" and constant litigation for the possession of a child are the results of nonrecognition of foreign custody decrees, the best interests of the child are defeated.

One writer has proposed a "clean hands" approach to the problem. This theory suggests that only if the party seeking to relitigate the question of the child's custody comes before the court in good faith without fault with respect to the child, should such relitigation be allowed. Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345 (1953).

Whatever the best view, the welfare of the child cannot be promoted if its custody is controlled by uncertain rules as to constitutional questions and is so easily subject to change under them.

Forest Jackson Bowman

Criminal Law—Shoplifting—Lack of Requirement of Intent Does Not Invalidate Statute

D was found guilty of a misdemeanor offense under the North Carolina shoplifting statute. On appeal, *D* moved that the warrant be quashed on the ground that the statute does not require any felonious intent, and is therefore unconstitutional. The court allowed this motion to quash. *Held*, reversed. The shoplifting statute is not violative of state or federal constitutions although

it does not require any felonious intent. *State v. Hales*, 122 S.E.2d 768 (N.C. 1961).

In the area of effective social control of shoplifting, the need for statutory alteration of the common law rule has become increasingly apparent in recent years. In response to such need, many states have enacted shoplifting statutes. The common law rules, developed at a time when the modern merchandising methods were unknown, are ill-adapted to current needs. Since felonious intent is a necessary element of larceny, an honest merchant, if he fails to secure a conviction of the accused, subjects himself to liability for false arrest, false imprisonment, or malicious prosecution. As a consequence, many merchants helplessly stood by observing a wrong, fearful of being prosecuted themselves lest their convictions be correct. See Comment, 63 W. VA. L. REV. 196 (1961). One conservative estimate has placed the yearly loss due to shoplifting in excess of 100,000,000 dollars. *Wall Street Journal*, Oct. 31, 1956, p. 1, col. 4. The North Carolina statute, similar to West Virginia's statute, merits consideration.

The North Carolina statute provides:

"Whoever, without authority, wilfully conceals the goods or merchandise of any store, not theretofore purchased by such person, while still upon the premises of such store, shall be guilty of a misdemeanor. . . . Such goods or merchandise found concealed shall be prima facie evidence of a wilful concealment." N.C. Gen. Stat. S 14-72.1 (Supp. 1961).

The defendant attacked this statute on three grounds: (1) it does not inform the defendant, with reasonable precision, of the act it prohibits; (2) the statute is so general and indefinite that it is void for uncertainty; and (3) it is unconstitutional because it does not require any felonious intent.

It is a general rule of law that the forbidden conduct need not be described with mathematical precision or absolute certainty. Reasonable certainty is sufficient. 1 WHARTON, CRIMINAL LAW & PROCEDURE § 18 (1957). However, a criminal statute must be sufficiently definite so as to inform the citizen with reasonable precision what acts it intends to prohibit. It is not unfair to require that one who goes perilously close to an area of prescribed conduct shall take the risk that he may cross the line. *Boycie Motor Lines v. United States*, 342 U.S. 337 (1952). The statute in the principal case appears to be in conformity with the above

rule, since all essential provisions are present which state what the prohibited act is, and it informs a person of ordinary intelligence as to what course of conduct he may safely pursue.

The third defense raises two vital questions. May the legislature constitutionally declare an act criminal and thereby create a new statutory crime irrespective of the intent of the doer of the act? May the legislature constitutionally declare that goods or merchandise concealed upon or about a person, not theretofore purchased by such person, shall be prima facie evidence of a wilful concealment? In answering the first question in the affirmative, the court in the principal case stated that the legislature has the inherent power to define and punish any act as a crime, because it is undisputedly a part of the police power of the state. This power is, however, subject to the limitations imposed by the fourteenth amendment of the Constitution. In order to avoid a conflict with the fourteenth admendment, a statute which eliminates intent as a necessary element must be scrutinized in view of its manifest purpose and design. *State v. Correll*, 232 N.C. 696, 62 S.E.2d 82 (1950); *Hunter v. Tennessee*, 158 Tenn. 63, 12 S.W.2d 361 (1928). Another requisite for validity is that an act of the legislature declaring what shall constitute a crime must have some substantial relation to the ends sought to be accomplished. *People v. Belcastro*, 356 Ill. 144, 190 N.E. 301 (1934); 1 WHARTON, CRIMINAL LAW & PROCEDURE § 16 (1957). In *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910), the Court stated that legislation eliminating intent as an essential element of a statutory crime is sustained on grounds of necessity, and is not violative of federal or other constitutional prohibitions. The manifest purpose and design of the shoplifting statute is to provide an effective remedy against shoplifting for the merchant, thereby providing him with adequate protection. With this objective in mind, the legislature purposely eliminated intent as a necessary element of the crime, for this is the stumbling block inherent in common law larceny. Therefore, it necessarily follows that the creation of this crime does bear a substantial relationship to the end sought to be accomplished, and due process is not thereby violated.

The second question presented, whether the legislature can declare that the fact that goods are concealed is prima facie evidence of a wilful concealment, is more vexatious. The legislature is attempting to create a presumption which would assist the state in securing a conviction and in limiting the amount of evidence it

must produce to do so. Where, in the opinion of the court or legislature, the existence of the basic fact makes socially desirable the legal results which will follow if the presumed fact also exists, the accomplishment of the desired end may be facilitated by the creation of a presumption. Note, 61 W. VA. L. REV. 209, 212 (1959). However, there must be a guide as to what or how much may be presumed from the existence of certain facts. Such a guide was set forth in *Casey v. United States*, 276 U.S. 413 (1928). The legislature has the power to enact provisions wherein when certain facts have been proved, they shall be prima facie evidence of the main fact in question, if the fact proved has some fair relation to, or natural connection with, the main fact. A second guide is that the presumption must be connected with the main fact proved in common experience. *Morrison v. California*, 291 U.S. 82 (1933). What is a "fair relation to" or "connected in common experience," may be gleaned from cases dealing with the use of presumptions.

In *Hawes v. Georgia*, 258 U.S. 1 (1921), the statutory offense was that of knowingly permitting a still upon the defendant's premises. The statute provided that when distilling apparatus was found on the premises, this should be prima facie evidence that the person in actual possession had knowledge of its existence. The defendant's premises were a farm upon which the still was found. The Court held that this presumption was valid because the existence of the basic fact proved (presence of the still) is connected in common experience with the presumed fact (knowledge of its existence). It is to be noted that no intent to use the still was necessary for a conviction under this statute. However, a statutory presumption was declared invalid in *Tot v. United States*, 319 U.S. 463 (1942). The defendant was convicted under § 2 (f) of the Federal Firearms Act, which Act contained the following presumption: From a prisoner's prior conviction of a crime of violence and his present possession of a firearm, it shall be presumed that such firearm was received by him in interstate commerce. The Court, although stating that Congress has the power to prescribe what evidence is to be received in the courts of the United States, held that proof of one fact is not evidence of the existence of the presumed fact. In so holding, the Court realized that in common experience there is no rational connection between the basic fact and the presumed fact.

Although there has been no prior litigation testing the validity of a shoplifting statute, it appears that the court reached the

proper conclusion in the instant case. Common experience dictates that one who conceals goods which he has not purchased almost inevitably is doing so wilfully, and with the intent of pilfering the item. This case seemingly falls within the category of *Hawes v. Georgia*, *supra*. Even though the principal case appears to contravene the maxim "it is better to allow ten guilty men to go free than to convict one innocent man," our modern merchandising methods and rapid pace of living necessitate the creation of a shoplifting statute.

Is the law governing the principal case applicable to the West Virginia shoplifting statute? This statute provides:

"If any person shall wilfully conceal upon his person or otherwise merchandise belonging to any store and for which such person has not paid the purchase price in full, either upon or away from the store premises, there shall be a *prima facie* presumption that such person has concealed said merchandise with the intent of converting the same to his own use" (italics supplied). W. VA. CODE ch. 61, art. 3A, § 3 (Michie 1961).

Our statute differs from the North Carolina statute in four respects: (1) the person may be away from the premises; (2) intent is a necessary element, although it may be presumed if all other requisite elements are proved; (3) the felony stage is attained if the value of the article taken exceeds fifty dollars; (4) shoplifting is a breach of the peace. Differences (3) and (4) are found in § § 2 and 4 of the code.

The West Virginia Legislature did not deem it expedient to eliminate intent from the statute, as the North Carolina Legislature did. Instead the West Virginia statute creates a presumption that the actor intended to convert the goods to his own use if the other stated requisites are shown. It therefore appears that the statute does little more than codify common law larceny. However, two advantages inure from the statute. It limits the amount of evidence which the state must produce in order to state a *prima facie* case, and the accused must show intent was lacking as a matter of law before he is entitled to a directed verdict.

In a criminal case, the state bears the burden of proving the defendant's guilt beyond a reasonable doubt. *State v. Stull*, 110 W. Va. 576, 158 S.E. 905 (1931). The state must, therefore, prove all of the required elements which constitute the crime beyond a

reasonable doubt. The statutory presumption relieves the state of producing evidence which would prove the felonious intent of the accused. The court stated in *State v. Dodds*, 54 W. Va. 289, 46 S.E. 228 (1903), that a presumption is a rule of law that courts or juries may draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such presumption is disproved. The burden of going forward with the evidence shifts from the state to the accused. *State v. Dodds, supra*. However, the burden of proof and the burden of persuasion do not shift, but remain upon the state. When the basic facts are established by the evidence, the defendant may destroy the presumption by either disproving the basic fact itself, or by producing sufficient evidence of the nonexistence of the presumed fact. NASH, *THE LAW OF EVIDENCE, VIRGINIA AND WEST VIRGINIA* § 209 (1954). If the defendant does not rebut the presumption, and there is evidence that the basic fact exists, the party in whose favor the presumption operates is entitled to have the jury instructed that they must find the presumed fact if they find the basic fact exists. NASH, *THE LAW OF EVIDENCE, supra* at § 215.

These, then, are the effects of the presumption. An application of the above rules to the West Virginia shoplifting statute may best be accomplished through hypothetical situations. First, assume that X has a bulge in his pocket which Y, the store manager, thinks may conceal merchandise. Y stops X and finds unwrapped goods. X is beyond the check-out counter and is progressing toward the exit. X's excuse is that he "forgot" to pay. Upon these facts, X is attempting to rebut the presumption by his defense of "forgetting" to pay. The state need offer no contrary evidence, the case goes to the jury, and the decision rests with it as to whether X has successfully shown lack of intent. In this situation, the jury might well find X's explanation untenable and inadequate to rebut the presumption. If X's defense is that he bought this article elsewhere, in the absence of any corroborating testimony, the determination rests with the jury. If corroborated, X may be entitled to a directed verdict if the judge feels as a matter of law that a basic fact has not been proved, and therefore, the presumption of intent, which rests upon proof of the basic facts, cannot arise. Without the requisite intent, the state's case must fail.

Second, assume the same as above, except that X is stopped before he reaches the check-out counter. If X's defense is that he was unable to hold all of the items in his hand, and thus placed

some in his pocket, the jury again must decide if this explanation is plausible enough, under the circumstances, to rebut the presumption. An important element shedding light upon X's intent is the manner in which he concealed the merchandise. If he placed the goods in his pocket or in the bottom of a shopping bag, this would seem to indicate that the requisite intent to shoplift was present. If he placed the goods in a more revealing position, the jury might well find that his explanation dissolves the presumption of intent. Thus, the controlling elements appear to be the manner in which the goods are concealed and at what location in the store the accused is accosted.

While the West Virginia statute aids the state in its prosecution by employing a presumption of intent, the North Carolina statute seems to be the better of the two, in that it eliminates the intent element altogether. Viewing the ultimate goal to be attained, that of affording the merchant a practical remedy for his protection, the North Carolina statute more nearly satisfies this need. Although some injustice may result in North Carolina because one with a plausible explanation may still be found guilty, an equal injustice may result in West Virginia. Where one who is guilty is acquitted because the jury felt that the accused had successfully rebutted the presumption of intent, he may then bring an action against the merchant for false arrest, false imprisonment, or malicious prosecution. The law must treat all citizens equally, and the housewife who picks up a fifty cent item is equally as guilty as a professional shoplifter who takes hundreds of dollars worth of merchandise. Our shoplifting statute is a step forward toward modernizing the law to keep pace with the modernized world of today.

David Mayer Katz

Labor Law—Jurisdiction of NLRB—Dollar Yardsticks of NLRB and the "Affecting Commerce" Test

The National Labor Relations Board assumed jurisdiction of a labor dispute where the evidence showed that Employer, a New York corporation, sold within the state more than 500,000 dollars worth of fuel oil products purchased in the state from a refinery engaged in interstate commerce. The Board found Employer had engaged in unfair labor practices and petitioned the United States Circuit Court of Appeals for enforcement of an appropriate cease